SUPP

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. —273

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, and GEORGE KOZBIEL,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UAW-AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Russell Scofield, Lawrence Hansen, Emil Stefanec and George Kozbiel petition for a writ of certiorari to review the decree of the United States Court of Appeals for the Seventh Circuit entered in this case on April 16, 1968. (App. p. 1a)

OPINIONS BELOW

The opinion of the Court of Appeals (App. p. 3a) is reported at 67 LRRM 2673, 57 CCH Labor Cases

¶12,531. The decision and order of the Board (App. p. 14a) are reported at 145 NLRB 1097. This case was previously before this court with respect to the issue of the right of the union to intervene in the proceedings before the Court of Appeals. The opinion on that issue is reported at 382 U.S. 205. That issue is not involved in the present petition.

JURISDICTION

The decree of the Court of Appeals was entered on April 16, 1968. The jurisdiction of this court is invoked under 28 USC 1254(1) and §10(e) of the National Labor Relations Act, as amended, 29 USC §160(e).

QUESTION PRESENTED

Whether a union restrains or coerces an employee in the exercise of a right guaranteed by Section 7 of the National Labor Relations Act, in violation of Section 8(b)(1)(A) of the Act, when the union fines an employee, and attempts to collect such fine by court action, because the employee performed work and earned wages in excess of certain production quotas established and enforced by the union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 USC 151, et seq.) are as follows:

> "Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bar-

gaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . ."

"Section 8(b). It shall be an unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein, . . ."

STATEMENT OF THE CASE

The facts are fully set forth in the decision of the Board (App. p. 14a). The essential facts are few and undisputed.

The union has been the collective bargaining representative of the employees of Wisconsin Motor Corporation in Milwaukee, Wisconsin since 1937. Under the collective bargaining agreement in force at the time this dispute arose, employees of the company were required either to belong to the union or to pay the union a service fee equivalent to dues.

For a number of years the union has had in effect a rule which required union members to limit their production so that their earnings of incentive pay would not exceed certain specified ceilings. The ceilings were the subject of collective bargaining between the company and the union from time to time. Although the company knew of the existence of the ceilings and attempted to have them raised or eliminated, the company did not recognize the ceilings as a limit on the amount which an employee could earn. If an employee chose to ignore the ceilings and produce and report work in excess of the ceilings,

the company paid the employee for his actual production without regard to the ceilings.[1]

The union enforced the ceiling rule by imposing fines on members. Ordinarily the fines were limited to one dollar for each violation. However, persistent violations subjected an employee to a charge of conduct unbecoming a union member with consequent exposure to fines up to $100 for each offense. The petitioners here were charged with conduct unbecoming a union member for having violated the ceiling rule, and following union trials, fines ranging from $50 to $100 were imposed. The union has instituted civil actions in the Wisconsin courts for the collection of such fines, which actions are still pending.

The petitioners here filed charges with the National Labor Relations Board alleging that the union action in imposing and attempting to collect fines for violation of the ceiling rule restrained and coerced the petitioners in the exercise of their right under Section 7 of the National Labor Relations Act[2] to refrain from concerted union activities. A complaint was issued by the General Counsel of the Board alleging that such action by the union constituted an unfair labor practice under Section 8(b)

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[1] The practical effect of the ceiling rule was elaborated in the opinion of Board member Leedom:

> "The Employer has placed no limits on the employees' production or earnings and has vigorously opposed such a limitation, but without success. The Company is in a highly competitive market, and the increased costs resulting from the Union's production ceilings have caused a decline in its competitive position. The record shows that the Union's production ceilings have reduced and slowed down production, that an employee can reach the production ceiling in 5 hours, and that the employees have read books, played cards, and talked in the remaining time." 145 NLRB 1097 at 1106 (App. p. 28a)

[2] Hereinafter referred to as the Act.

(1) (A) of the Act. The Board dismissed such complaint, finding that no unfair labor practices had been committed. (App. p. 25a)

Pursuant to Section 10(f) of the Act, the petitioners here petitioned the Seventh Circuit Court of Appeals for review of the decision and order of the Board. Consideration of the merits of the petition was delayed in the Court of Appeals pending the review by this Court of the right of the union to intervene as a party in the proceedings before the Court of Appeals. Thereafter proceedings were further deferred pending the consideration by this Court of related issues which were ultimately resolved in the case of *National Labor Relations Board v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175. Following that decision the Court of Appeals renewed consideration of the petition for review in the present case and ultimately by a divided court denied the petition. (App. p. 2a)

REASONS FOR GRANTING THE WRIT

In the *Allis-Chalmers* case, 388 U.S. 175, this Court held that there was no violation of Section 8(b)(1)(A) of the Act where a union imposed fines of $100 or less against employees for crossing the union picket lines and working during a strike. This Court was closely divided in that case with a majority of four justices, a concurring opinion by Mr. Justice White, and a vigorous dissent joined in by four justices.

The court below has now misconstrued the *Allis-Chalmers* decision and applied it far more broadly than its proper limits. Contrary to the clear statutory language and the supporting legislative history, the court has granted a broad immunity to union fines which in no way involve the special policy considerations relied upon by the majority in the *Allis-Chalmers* decision.

The decision below is in conflict with the approach taken by the Court of Appeals for the Ninth Circuit in the case of *Associated Home Builders of the Greater East Bay v. NLRB,* 352 Fed. 2d 745. As recognized by the court in that case, the question of union production limitations involves issues and policies which differ importantly from the simple question of the legality of union fines.

As will be further elaborated below, it is essential that this Court grant review here. The present case presents an ideal vehicle for this Court to further elucidate this important area in the administration of the Act and to provide necessary guidelines for the resolution of the numerous cases involving union fine issues which are now pending before the NLRB and the courts.

1. The decision below upholds the validity of a coercive union device for restricting the productive output of an individual employee. Although the individual is willing to work in accordance with his abilities and the employer is willing to pay him for whatever work he produces, the union fine effectively inhibits the employee from earning the money the employer is willing to pay. Such a restraint upon production has broad implications, affecting not only the legal issues in application of the Act but more importantly, the critical economic question of the productivity of American industry.

In recent years the question of the productivity of the individual worker has become a central focus of national economic planning. This concept has been prominent in the analysis of the causes and control of inflation and the establishment of national guidelines governing wage decisions. In this context, the approval or even tolerance of coercive union fine tactics to limit individual produc-

tivity poses a serious national issue which this Court can resolve through enforcement of the clear prohibitions of Section 8(b)(1)(A) of the Act.

It is an essential foundation of national labor policy that issues of wages, work loads and productive output should be resolved through the collective bargaining process. This concept is the bedrock of the Act. Yet through the device of coercive fines, the union here effectively bypasses the collective bargaining process and enforces a production and wage limitation which it was unable to obtain in negotiations with the employer.[3]

The decision of the Court of Appeals for the Ninth Circuit in the case of *Associated Home Builders of the Greater East Bay, Inc. v. NLRB*, 352 Fed. 2d 745 recognized the critical distinction between this type of case and the general issue of the legality of union fines. The court there considered union fines imposed upon employees for exceeding production quotas imposed by the union. The court gave careful consideration to the issues raised under Section 8(b)(1)(A) of the Act, but found that it was unnecessary to decide these issues. Rather, the court recognized that the union conduct in question was a serious interference with the collective bargaining process contemplated by the Act. Therefore the court remanded the case to the Board for further consideration of this aspect of the dispute. By way of contrast, the court in the present case dismissed the complaint against the union and found the union fines to be immune under the *Allis-Chalmers* doctrine.

[3] In its argument to the Court of Appeals the union emphasized its long opposition to incentive pay systems and the claimed justifications for the ceiling rule. Such arguments are beside the point. Under the scheme of the Act, such objectives may only be sought through collective bargaining, not through coercion against the right of the individual to refrain from the union activity.

2. The decision of this court in the *Allis-Chalmers* case neither requires nor supports the broad immunity for union fines permitted by the Court of Appeals here. The dissenting opinion of Mr. Justice Black in the *Allis-Chalmers* case forcefully demonstrated that the statutory language as confirmed by the legislative history brought union fines within the prohibitions of Section 8(b)(1)(A) of the Act. The contrary opinion of the majority in that case pointed to certain overriding policies which were deemed to require approval of the particular union fines involved there. The present case involves no such special policies. In fact the union fines in the present case are in direct opposition to the policies which the court sought to further in the *Allis-Chalmers* decision.

The majority in *Allis-Chalmers* saw the union fines there as an essential support for the proper function of the union as a collective bargaining agent. By contrast, the fines here do not aid collective bargaining but rather bypass, ignore and weaken it.

The critical distinction between the *Allis-Chalmers* case and the pending case is the nature of the union policy sought to be enforced by the imposition of coercive union fines. In the *Allis-Chalmers* case that policy was a restriction against crossing a picket line and working during a strike. In the instant case the objective of the union is to require an employee to observe a union-imposed production limitation which would restrict the employee's work output and the employee's earnings. A union fine to implement such an objective clearly restrains and coerces the employee within the meaning of Section 8(b)(1)(A) of the Act in his exercise of his right under Section 7 of the Act to refrain from the union production limitations. The reach of the *Allis-Chalmers* decision is not so broad as to permit such coercion.

The petitioners here ask only the right to be permitted to work in accordance with their capacity and to earn the rewards that the employer must pay under the applicable collective bargaining agreement. The union on the other hand seeks to accomplish by unilateral fines what it has been unsuccessful in accomplishing through collective bargaining, namely a limitation of an employee's output and pay to fixed limits set by the union.

Unlike the *Allis-Chalmers* case, we are not here concerned with a traditional and central union activity, such as the strike, which was given firm and explicit protection under the Act. Rather we here see a union activity which has never found favor with the Board or the courts and which is not even protected by the Act.

Numerous decisions of the Board have held that various forms of union production restrictions are not protected activities under the Act. For example, in *General Electric Co.*, 155 NLRB 208, the Board held that an employer did not commit an unfair labor practice when it discharged an employee for attempting to induce other employees to engage in a deliberate restriction of production under an incentive pay system. Such activity by the employee was found not to be protected under the Act.

Numerous other cases have established that the Act does not protect a variety of union techniques for slowing down or interfering with production. Representative decisions are *Automobile Workers, Local 232 v. WERB*, 336 U.S. 245; *NLRB v. Montgomery Ward & Co.*, 157 F. 2d 486; *Elk Lumber Co.*, 91 NLRB 333; *Celotex Corp.*, 146 NLRB 48; *Raleigh Water Heater Manufacturing Co.*, 136 NLRB 76. Moreover, the Board has specifically recognized that an employee has the protected

right under the Act to refrain from such union production restrictions. *Printz Leather Company, Inc.*, 94 NLRB 1312.

The sharp distinction between the policies involved in the *Allis-Chalmers* case and the policies involved here is highlighted in the article by Professor Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, one of the principal authorities relied upon by Mr. Justice Brennan in his *Allis-Chalmers* opinion. That article reviews the existing precedents with regard to various reasons for union discipline and points out that while discipline for strike-breaking is universally recognized, discipline relating to production restrictions has not been enforced by the courts. See 64 Harv. L. Rev. 1049, 1065. An observation of great force here can be found in the case of *Dragwa v. Federal Labor Union No. 23070*, 41 Atl. 2d 32, 34:

> ". . . if a voluntary trade organization should ordain that a member who in the pursuit of his occupation exceeds the average level of industry and production of his fellow workers, shall be expelled for conduct unbecoming a member, I would experience no hesitancy in invalidating such a regulation as positively repugnant and inimical to our traditional public policy. The freedom of an individual to excel in any field of lawful activity is one of our national ideals and a substantial right which the individual may not himself barter away."

In the *Allis-Chalmers* case this Court permitted a union fine which it deemed to be in furtherance of the proper role of the union as a collective bargaining agent and the exercise of the traditional union strike power. The principle of that case must not be extended to permit fines in furtherance of other union policies which do not further the purposes of the Act. Here the union

seeks to utilize the fine as a device to achieve a production restriction it was unable to achieve through collective bargaining and to limit the protected right of an individual to work and earn to his full capacity. Such action by the union constitutes an unfair labor practice under the express language of the Act and nothing in the interpretation of the Act in the *Allis-Chalmers* case requires a contrary conclusion.

3. The extent to which Section 8(b)(1)(A) of the Act limits union disciplinary sanctions is an important and recurring question of interpretation under the Act. The *Allis-Chalmers* decision established one guidepost. More recently the *Allis-Chalmers* approach was distinguished when this Court ruled that Section 8(b)(1)(A) of the Act was violated by a union which expelled a member for failing to exhaust intra-union grievance procedures prior to filing a charge with the NLRB on a matter that touched an area covered by the Act. *National Labor Relations Board v. Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO,* 68 LRRM 2257. These two decisions can be harmonized only on the theory that legality of union discipline under Section 8(b)(1)(A) is dependent upon a balancing of the particular policies and interests involved.

In this context further elucidation of the limited rationale of the *Allis-Chalmers* decision is essential. In the absence of such clarification substantial injustice is likely to result not only in proceedings before the Board and the Appellate Courts involving union fine matters but also in state court actions where unions seek to collect such fines from the individual employees.

The decision of the court below represents an erroneous reading of the *Allis-Chalmers* decision as a blanket

immunity for union fines. Similarly, in state court collection actions the decision has been interpreted not only as validating the fine but as requiring state court enforcement of the fine regardless of any contrary state policies. See *Local 248, UAW-AFL-CIO v. Natzke,* 36 Wis. 2d 237, 153 N.W. 2d 602.

In the present state of the law, an individual employee who is wronged by a union fine and seeks to prevent court collection of the fine is faced with an almost impossible burden. In order to obtain relief on the federal level he must first convince the General Counsel of the NLRB that he has a meritorious case and then pursue the case through successive appeals to this Court. In the alternative if he wishes to contest the fine in the state system, he must pursue the various fruitless appeals through the highest state court and then hope to obtain relief through review by this Court. It will be a rare individual who can muster the resources and the patience for such a contest.

Because of these severe practical difficulties faced by an individual employee seeking to resist a fine of this nature, it is essential that this Court provide the maximum possible guidance to the NLRB and the state and federal courts to assure that just and proper decisions in accord with the Act are reached at the lowest practicable level. The present case presents an ideal vehicle for clarifying the limited scope of the *Allis-Chalmers* decision and preventing the Board and lower courts from improperly construing that decision as a blanket endorsement of union fines.

CONCLUSION

The question whether Section 8(b)(1)(A) bars a union from fining its members for violation of union rules is an important and recurrent one in the administration of the Act. To prevent further overly broad application of the *Allis-Chalmers* doctrine, the present case should be reviewed and reversed. The petition for certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX

DECREE

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, GEORGE KOZBIEL, *Petitioners.*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

APRIL 16, 1968

No. 14,698

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, Intervenors.

Before KNOCH, *Senior Circuit Judge,* and SWYGERT and CUMMINGS, *Circuit Judges.*

THIS CAUSE came on before the Court upon a petition to review and set aside an order of the National Labor Relations Board, dated January 17, 1964, dismissing a complaint against Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, in Board Case No. 13-CB-1059-1, 13-CB-1059-2, 13-CB-1059-3 and 13-CB-1059-4. The Court heard argument of respective counsel on January 17, 1968, and has considered the briefs and transcript of record filed in this cause. On March 5, 1968, the Court being fully advised in the premises handed down its opinion denying the petition to review. In conformity therewith it is

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Seventh Circuit that the petition to review an order of the National Labor Relations Board dated January 17, 1964, dismissing a complaint against Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, in the above matter, be and it hereby is denied.

WIN G. KNOCH
Judge, United States Court of Appeals for the Seventh Circuit

LUTHER M. SWYGERT
Judge, United States Court of Appeals for the Seventh Circuit

WALTER J. CUMMINGS
Judge, United States Court of Appeals for the Seventh Circuit

A True Copy:
Teste:

KENNETH J. CARRICK
Clerk of the United States
Court of Appeals for the
Seventh Circuit.

OPINION OF THE COURT OF APPEALS

Before KNOCH, *Senior Circuit Judge*, and SWYGERT and CUMMINGS, *Circuit Judges*.

CUMMINGS, *Circuit Judge*. Petitioners, four employees of Wisconsin Motor Corporation ("the Company"), ask us to set aside an order of the National Labor Relations Board dismissing an unfair labor practice complaint that had issued upon their charges against their Union.[1]

Petitioners are members of a Union that has been the bargaining representative of the production employees of the Company since 1937. The collective bargaining contract requires such employees to belong to the Union or to pay it a service fee equivalent to dues. The Company is based in West Allis, Wisconsin, where it manufactures motors. Half of its 850 production employees, including these petitioners, are compensated on a basis permitting them to earn amounts above their basic hourly wages by producing at a rate in excess of established hourly norms of output.

In 1944, the Union membership adopted a resolution providing in substance that "the men turn in [report for payment] no more than 10 cents per hour over and above the new machine rates." In 1946, the membership approved fines as penalties for violation of that ceiling rule. The penalties are presently contained in a February 1961 Union by-law which provides that any member violating the production ceilings is "guilty of conduct unbecoming a Union member" and subject to a fine of $1.00 for each violation. The by-law also provides that

[1] Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO. The parent Union is an intervenor.

in case of persistent ceiling violations, the offender would be charged with "conduct unbecoming a Union member." If a member were found guilty of such conduct, he could be assessed with a maximum fine of $100 (enforceable within a specified time by automatic suspension or expulsion) or suspended or expelled from membership. The Union's sanctions do not impair a member's status as an employee of the Company.

Ceilings were established from time to time through collective bargaining between the Company and the Union although the Company did not agree to limit wages accordingly. Thus if an employee produced work in excess of the ceilings, the Company would on request pay him for his actual production without regard to the ceilings. So far the Company has been unsuccessful in its bargaining for the elimination of the Union ceiling rates, but the ceilings on all piecework jobs were increased in July of 1953 and August 1956. The ceilings in effect at the time of this dispute were between 45 and 50 cents above the machine rates.

By Union rule, any production which a production employee member has turned out at a pace which would yield hourly rates above the ceiling rates is not to be reported to the Company for immediate compensation. Instead, such members are required to "bank" with the Company their earnings in excess of ceilings. On occasions when they receive less than ceilings (for example, through absence or enforced idleness), the Union permits the members to draw upon their "bank" by charging the Company for work previously produced but not reported for wage purposes. Although the Company normally acquiesces in the "banking" system, if an employee chooses to disregard the Union rule and report all production for immediate payment, the Company,

as noted, will pay him even though the Union ceilings are exceeded.

In 1946, the Union first began enforcing its "banking" system by imposing fines. In 1961, the Union found that six members had violated the "banking" system by reporting to the Company for immediate payment production at a rate in excess of the Union ceilings. Two members were fined $35 each and paid their fines. Two of the petitioner members were fined $100 each, the third was fined $75, and the fourth was fined $50. Instead of paying their fines, the four petitioners filed unfair labor practice charges with the Regional Director of the National Labor Relations Board in May 1961. In October 1961, the Union filed a suit to collect the fines in the Civil Court of Milwaukee County, Wisconsin, where it is still pending. In December 1961, the General Counsel of the Board issued a complaint charging that the Union, in fining and suing petitioners, had restrained and coerced them in the exercise of their rights under Section 7 of the National Labor Relations Act[2] and thereby violated Section 8(b)(1)(A)[3] of the Act. The Union and Company have taken no measures to impair the job status of the petitioners.

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[2] Section 7 grants employees the right to refrain from concerted activities. It provides in pertinent part (29 U.S.C. § 157):

"Employees shall have the right to * * * engage in * * * concerted activities * * *, and shall also have the right to refrain from any or all of such activities * * *."

[3] Section 8(b)(1)(A) provides in pertinent part (29 U.S.C. § 158 (b)(1)(A)):

"(b) It shall be an unfair labor practice for a labor organization or its agents —

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *."

The Trial Examiner and the Board concluded that Section 8(b)(1)(A) had not been violated and dismissed the complaint. In view of the authoritative construction of that Section in *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, we must deny the employees' petition for review.

As early as 1951, this Court construed the proviso in Section 8(b)(1)(A) in *American Newspaper Publishers Association* v. *National Labor Relations Board*, 193 F.2d 782 (7th Cir. 1951), affirmed on other grounds 345 U.S. 100. There the union threatened to expel members for violation of a rule forbidding them to work in a shop with non-members. Even though the expulsion might involve the loss by the employee of his job and other economic benefits such as pension and mortuary provisions, we held (at pp. 800-801, 806):

> "Under this limitation [proviso] Congress left labor organizations free to adopt any rules they desired governing membership in their organizations. Members could be expelled for any reason and in any manner prescribed by the organization's rules, so far as § 8(b)(1)(A) is concerned. This interpretation has support in the legislative history of the Act. It is also significant that while the Board has been so interpreting this section of the Act during the past four years, Congress has not amended the section to indicate that a broader interpretation of the section was intended or desired. It is not within the power of the courts to write into this section of the Act, by interpretation, language which would broaden its scope.
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> * * * * *
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> "* * * the proviso in § 8(b)(1)(A) permits unions to enforce their internal policies upon their membership as they see fit."

In *National Labor Relations Board* v. *Amalgamated Local 286*, 222 F.2d 95 (7th Cir. 1955), the union threatened to deprive certain members of group and hospitalization insurance coverage because they had refused to pay various disciplinary assessments and fines which the Union had imposed upon them. Following the lead of *American Newspaper Publishers Association*, the Court held that under the proviso in Section 8(b)(1)(A) the union's threatened withdrawal of the insurance rights of the complaining employees as a disciplinary measure was in full conformity with its right to regulate its internal affairs.

Thus in this Circuit, even before the decision in *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, great breadth was accorded to the proviso in Section 8(b)(1)(A). In *Allis-Chalmers*, the opinion of the Court holds that the words "restrain or coerce" used in Section 8(b)(1), as shown by the legislative history of the Section, were not meant to encompass internal affairs of unions. In other words, internal union disciplines are not among the proscribed restraints. In reaching this conclusion, the Court was partly motivated by our national labor policy that clothes a union with powers analogous to a legislature, with union rules enacted by the majority becoming binding on the minority. The Court noted that in the case of a strong union, expulsion from membership is a far more severe penalty than a reasonable fine (at p. 183).[4] The Court's examination of the legislative history of Section 8(b)(1)(A) convinced it that the statute does not prohibit union imposition of disciplinary fines and suits to collect them. In reaching its conclusion that the

[4] See also Cox, "The Role of Law in Preserving Union Democracy," 72 Harv. L. Rev. 609, 612, 622-623 (1959)

body of Section 8(b)(1)(A) was inapplicable to fines and collection suits aimed at union members crossing picket lines and working during lawful strikes, the Court found cogent support in the proviso to Section 8(b)(1), stating (at pp. 191-192):

> "At the very least it can be said that the proviso preserves the rights of unions to impose fines, as a lesser penalty than expulsion, and to impose fines which carry the explicit or implicit threat of expulsion for nonpayment. Therefore, under the proviso the rule in the UAW constitution governing fines is valid and the fines themselves and expulsion for non payment would not be an unfair labor practice."

The Court found it unnecessary to decide whether Section 8(b(1)(A) "proscribes arbitrary imposition of fines, or punishment for disobedience of a fiat of a union leader" (at p. 195).[5]

In his concurring opinion, Mr. Justice White relied more on the proviso to Section 8(b)(1)(A) than on legislative history showing the inapplicability of the "restrain or coerce" language of the body of the Section. In joining in the opinion of the Court, he noted that there might be some internal union rules "which on their face are wholly invalid and unenforceable" (at p. 198).

Union opposition to piecework has a history in the labor union movement dating at least back to 1908.[6] Fines and expulsion of members for violating the present and antecedent ceilings have been the rule for 22 years. We are told that the work of a majority of these employ-

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[5] It should be noted that the amounts of the instant fines are reasonable, so that there is no need to read Section 8(b)(1) as barring court enforcement of them. We need not consider whether excessive fines would be proscribed by that Section.

[6] See Slichter, *Union Policies and Industrial Management* (1941), pp. 285-286.

ees would be jeopardized by younger, more energetic employees, and that the rule is therefore intended to protect the well being of all members, for if the younger employees received higher pay by increased production, the older members, unable to turn out similar piecework quantities, would be demoralized and even face lay-offs. As the Trial Examiner pointed out, ceiling rules derive from a legitimate, traditional interest in union objectives. They reflect fears of (1) employees working themselves out of jobs by overproduction; (2) the establishment of a new productive norm lowering the piecework rate and the compensation for actual production; (3) morale-threatening jealousies and (4) health problems caused by too much pressure. These factors were covered in some detail in the excerpts from various labor authorities appended to his report (145 NLRB at pp. 1138-1141. One such authority explained the purpose of ceiling limits as follows:[7]

> "At their *inception* the purpose of limits applying to pieceworkers is not primarily to make work but partly to protect the union from being weakened by jealousies and dissensions arising from the fact that some workers receive better jobs than others, partly to prevent foremen from playing favorites in assigning jobs, and partly to prevent employers from cutting liberal piece rates or from using the high earnings of some workers as an argument against a general increase in piece rates. Such limits have in the past been common among the glass bottle blowers, the flint glass workers, the potters, the stove molders, and in 1940 are being imposed by the leather workers in Massachusetts."

[7] Slichter, *op. cit.*, pp. 166-167; see also pp. 296-305.

Thus the rule has a rational basis, and we cannot say that it was not reasonably calculated to achieve a permissible end. Accepting the *Allis-Chalmers* stricture that in considering questions of union discipline a union is comparable to a legislature, our function is to determine whether these fines conform to policies formulated by the Union and not violative of its constitution or of federal law.[8] Since the end here was a legitimate union objective and the means were appropriate to enforce it, our hand should be stayed. *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 420. Enough has been said to show that the Union's imposition of these fines was not arbitrary and that the rules themselves are grounded on a long-standing policy and cannot be deemed invalid or unenforceable on their face.

Petitioners argue that the present rule circumvents the bargaining process, and that the Union should have to obtain a provision against incentive pay through collective bargaining with the Company. Since petitioners concede that the Union can validly impose ceilings through collective bargaining, it is no great departure to allow them to be imposed by a disciplinary rule enforcing ceilings already established by collective bargaining. If a union has validly established a policy against overproduction, it must have the concomitant power to discipline members who violate ceilings. Cf. Summers, "Legal Limitations on Union Discipline," 64 Harv. L. Rev. 1049 (1951). Discipline has been described by the same author as the criminal law of union government. "The Law of Union Discipline: What the Courts Do in Fact," 70 Yale L.J. 175, 178 (1960).

As the intervenor pointed out, the rule enforced in *Allis-Chalmers* was of more serious economic conse-

[8] Summers, "Legal Limitations on Union Discipline," 64 Harv. L. Rev. 1049, 1073-1074 (1951).

quence to the employees, for they were not permitted to work during that strike and their jobs might be forfeited. Here the employees were permitted to work even in excess of ceilings, with the additional earnings deferred under the Union's "banking" system. Their job rights were unaffected by the rule. Petitioners assert that "banking" involves a very small amount of the Company's production and does not overcome the Union's limitation on production, but under Section 8(b)(1)(A) of the Act, as interpreted in *Allis-Chalmers,* the Union rule would survive even if there were no provision to "bank" excess earnings.

Petitioners depend principally on *Allen Bradley Company* v. *National Labor Relations Board,* 286 F.2d 442 (7th Cir. 1961). There the question was whether the union was obliged to bargain in good faith over a collective bargaining contract provision proposed by the employer limiting the union's right to discipline or fine its members. The holding was that the proposals made by the company were a proper subject for collective bargaining. The question for resolution by this Court was not whether union discipline of members violates Section 8(b)(1)(A). Furthermore, in that case, Judge Major stated (at p. 446):

> "Coercive action, whether by way of fine, discharge or otherwise, which deprives a member of his right to work and his employer of the benefit of his services, cannot be said to relate only to the internal affairs of the union."

In the present case, no member has been deprived of his right to work nor has the employer been deprived of the benefit of a member's services. To the extent that a dictum in *Allen Bradley* disapproves union fines and collection suits aimed at members crossing the union's

picket line and continuing to work for their employer, that dictum was flatly rejected in *Allis-Chalmers* and is no longer viable. But as *Allen Bradley* still holds, the Wisconsin Motor Corporation can require the Union to bargain over a demand to give up its ceiling rule.

Petitioners rely on *Printz Leather Co., Inc.*, 94 NLRB 1312 (1951), where the union threatened to strike if the employer did not discharge an employee who the union felt was working too fast. *Printz* is inapplicable because there the union's objective (unilateral imposition of production ceilings) and methods (threats to force the employer to discharge the employee) were manifestly improper. *Associated Home Builders of Greater East Bay, Inc.* v. *National Labor Relations Board*, 352 F.2d 745, 751-752 (9th Cir. 1965); *National Labor Relations Board* v. *Brotherhood of Painters*, 242 F.2d 477, 480-481 (10th Cir. 1957). They also rely on *Charles S. Skura*, 148 NLRB 679, 683 (1964), which held that the union violated Section 8(b)(1)(A) by fining an employee-member for filing an unfair labor practice charge against the union without first exhausting internal union remedies.[9] The Board held that the union's objective was at odds with policy considerations because " 'no private organization should be permitted to restrict any person's access to courts of justice' ". No policy considerations of comparable strength militate against the Union rule here at issue.

The petition for review is denied.

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[9] This question is now awaiting argument in the Supreme Court in *Industrial Union* v. *National Labor Relations Board*, No. 796, present Term. No view is expressed herein as to the correctness of the *Skura* rule.

No. 14698

KNOCH, *Senior Circuit Judge.* (dissenting) I think we are in error in concluding that Allis-Chalmers is dispositive of the case before us, and that there is a difference here only of degree and not of kind. The forceful dissent of the four Justices in Allis-Chalmers and the limited concurrence of Mr. Justice White seem to me to dictate a very cautious application of the principle of that case to other cases (such as this one) which involve no impairment of the collective bargaining power and its concomitant strike weapon. I fear that the majority have unduly extended the scope of Allis-Chalmers. In my opinion the coercive fines here imposed constituted an unfair labor practice, and the Board's dismissal of the complaint herein should be reversed.

DECISION AND ORDER OF NATIONAL LABOR RELATIONS BOARD

On June 7, 1962, Trial Examiner A. Norman Somers issued his Intermediate Report in the above- entitled proceeding finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed, as set forth in the Intermediate Report attached hereto. Thereafter, the General Counsel and the Charging Parties filed exceptions to the Intermediate Report and briefs in support of their exceptions.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, and briefs and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions.

The facts in this case are fully set forth in the Intermediate Report and will only briefly be touched upon here.

The Respondent Union, whose membership is restricted to employees of the Company, has been the bargaining representative of the Company's employees since 1937. Its present contract, like earlier ones, contains a union-security clause which provides that employees have the option of either joining and maintaining good standing in the Union, or rejecting membership but paying the Union a "service fee."

During the past 25 years there has been in effect a union rule, revised from time to time, setting produc-

tion ceilings on piece work, or, more accurately, limiting the amount of incentive pay a member may earn.[1] As declared in the union bylaw, the rule is designed to implement the Union's "basic object . . . to protect members . . . in their employment and to give them as much security as the industry can provide." In operation, the ceilings, in each of the five labor grades, impose a limitation on the amount a member may earn over the machine rate, the minimum contract rate for that job classification. At present the ceilings are set at between 45 and 50 cents per hour over the machine rate. The union does not require that the member cease production when he has attained the ceiling rate for the day; he may continue working, but, in order to comply with the rule, he must not report, for credit toward his earnings, any items produced in excess of the amount permitted to be earned under the production quotas. He must, by a bookkeeping entry, "bank" this production for later payment. An employee may draw on his "bank" when for one reason or another he fails to earn the basic machine rate or even the lower "day rate." This may occur, for example, when he is sick and unable to work, or his machine is out of order. The Company itself, however, places no limitations on an employee's earnings. It will, if he so desires, pay him immediately for all production which he reports.

Members who violate production ceilings are subject to a fine of $1 for each violation, but persistent violators may be subject to a charge of conduct unbecoming a member, in which event a fine of $100 or a lesser amount may be imposed and a member suspended. A member who pays a fine may also be expelled. It is undisputed,

[1] Approximately half of the Company's 800 or more employees work under an incentive pay plan.

however, that the Union's sanctions to enforce the rule may not be extended to impair a member's status as an employee. The rule of course has no application to non-members who may be employees of the Company.

The rule limiting incentive pay is not incorporated in the contract as a term of employment. Although the Company does not consider itself bound by the rule, and at various times during negotiations has unsuccessfully sought to induce the Union to drop the ceilings, the Company nevertheless as a practical matter has accepted the ceilings as an integral part of the *modus operandi* and has recognized the ceilings as forming an important element of its negotiated wage structure. So far as appears, the Company has never sought to discipline any of its employees for adherence to the Union's ceiling restrictions. The Company uses the ceilings in computing wages and evaluating jobs. Ceilings have also played an important role in the negotiation of collective-bargaining agreements between the Company and the Union. Thus, in 1953, one of the Company's proposals was that the ceilings be increased at least 10 percent. The contract that year made provisions for a 13 cents per hour increase in ceilings. The 1956 strike settlement agreement provided for another increase in ceilings. In 1959, the Company made no request for the elimination of ceilings, but only requested that they be increased 10 cents.

Moreover, while abstaining itself from enforcing the ceiling rule, the Company voluntarily aids and cooperates with the Union in the administration of the rule. Thus, the Company joins in the "banking" procedures by making the necessary bookkeeping entries. The Company also allows the ceilings to be posted on its bulletin boards. And it assists the Union in policing enforcement

of the rule by making available to the Union the members' production records and allowing the union stewards to inspect such records on Company time without loss of pay.

At such an inspection, conducted in February 1961, the Respondent Union found that the Charging Parties had violated the rule by exceeding their production quotas. The Charging Parties are all members of the Union, who, by their decision to join, have elected to subject themselves commonly with other union members to union regulation and discipline. Following a hearing before the Union's trial board, each of the Charging Parties was found guilty of conduct unbecoming a member. Penalties were assessed against them, consisting of up to a year's suspension from membership and fines ranging from $50 to $100. In October 1961, the Charging Parties having failed to pay the fines, the Union brought suit in a State court to recover the amount of the fines. No evidence as to the outcome of the suit is before us. No action has been taken, or threatened, to impair the job status of the individuals involved.

The complaint alleges, and the answer denies, that the Union's action in imposing fines for breach of its production rule constituted a violation of Section 8(b)(1)(A) of the Act. That Section provides:

> It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of their rights guaranteed in Section 7, provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

In his full discussion of the issues, the Trial Examiner concluded, we believe correctly, that neither the legisla-

tive history of the Section nor the body of the law dealing with and interpretating the Section since its enactment in 1947 as part of the Labor-Management Relations Act (the Taft-Hartley law) supports the view that Section 8(b)(1)(A) was intended to interdict the conduct under examination.

The General Counsel argues for a different reading of the legislative history, one that would give a broader interpretation to the language of the Section; he urges that the imposition of a fine constitutes restraint and coercion within the meaning of Section 8(b)(1)(A). Essentially, it is the General Counsel's position that the legislative purpose in enacting Section 8(b)(1)(A) was to protect the freedom of the individual workman from duress by the union as well as by the employer, and that it was the intent of Congress "to impose upon unions the same restrictions which the Wagner Act imposes upon employers with respect to violations of employee rights."[2] While there may have been such a general legislative purpose, this is not to say that Congress did not place certain limitations on that purpose. For one thing, the legislative history of Section 8(b)(1)(A) points to a Congressional intent to reach only certain limited conduct on the part of labor organizations. Thus, the Supreme Court in *Curtis Brothers*,[3] in commenting on the tenor of the expressions which preceded the Senate debate as to the Section's purpose, observed that "the note repeatedly sounded there is as to the necessity for protecting individual workers from union organizational tactics tinged with violence, duress or reprisal." The Conference Report makes it evident that the Section was

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[2] *International Ladies' Garment Workers' Union* v. *N.L.R.B. (Bernhard Altman)*, 366 U.S. 731, 738.

[3] *N.L.R.B.* v. *Drivers, Chauffeurs, and Helpers, Local 639 (Curtis Brothers)*, 362 U.S. 274.

so understood by the House. The House accepted the Senate bill as covering the same ground as its own proposed Section 12(a)(1),[4] a Section which would have made unlawful the use of force, violence, physical obstruction or threats thereof to accomplish certain purposes associated with organizational activity and strikes.[5]

If, as the General Counsel contends, the decision in *Bernhard Altman*[6] suggests a broader reach of Section 8(b)(1)(A), it is nonetheless evident that internal union disciplines were not among the restraints intended to be encompassed by the Section. Thus, as the Trial Examiner points out, when the introduction of Section 8(b)(1)(A) touched off expressions of apprehension that its language could be construed as interfering with the internal affairs of unions, Senator Taft, even before the proviso to the Section was introduced, affirmed that the sponsors had no intention to interfere with a union's internal affairs. The same opinion was voiced by Senator Ball on the introduction of the proviso. On that occasion he stated, "I merely wish to state to the Senate that the amendment offered by the Senator from Florida is perfectly agreeable to me. It was never the intent of the sponsors of the amendment to interfere with the internal affairs or organization of unions. The amendment of the Senator from Florida makes that perfectly clear." At a later point in the Senate consideration of the bill

[4] I Legislative History 546.

[5] I Legislative History 204-205.

[6] 122 NLRB 1289, affirmed *International Ladies' Garment Workers' Union, AFL-CIO* v. *N.L.R.B. (Bernhard-Altman)* 366 U.S. 731. In that case the Court upheld the Board's finding that the execution of a collective-bargaining agreement with a minority union whereby that union is recognized as the exclusive bargaining representative of all employees in the unit, restrained and coerced employees in that unit, and that this restraint and coercion was practiced both by the company and the union.

Senator Ball stressed the limited scope of the prohibitory part of the Section when he explained that the proviso:

> . . . is designed to make it clear that we are not trying to interfere with the internal affairs of a union which is already organized. All we are trying to cover is the coercive and restraining acts of the union in its efforts to organize unorganized employees.

The expressed disavowals of the sponsors, and other legislative facts marshalled by the Trial Examiner, make clear that Section 8(b)(1)(A) was not intended to reach the conduct here involved, even without regard to the purpose of the proviso, because, as is pointed out, it was not the kind of activity with which Section 8(b)(1)(A) was concerned.[7]

Proceeding from the premise that the prohibitory part of 8(b)(1)(A) was applicable to the type of conduct here involved, the General Counsel contends further that such conduct is not protected by the proviso to the Section. He concedes, however, that even though a fine be deemed coercive, it nevertheless would not violate Section 8(b)(1)(A) if the fine were merely an incident to "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership." But because in this instance the fine was collectible as a debt and not by threat of expulsion only, the General Counsel argues that the fine had more than the incidental relationship which would exempt it from the reach of the Section.

We do not read the language of the proviso so narrowly. There is nothing in the legislative history which suggests that Congress intended to permit a union to expel a member for violation of a union bylaw, but not to fine him for the same infraction without expelling him;

[7] See *International Association of Machinists* v. *Gonzales*, 356 U.S. 617.

or that it could enforce the fine by expulsion from the union but not by suing for its collection.

On the contrary, as the Trial Examiner has shown, Congress was more concerned with placing restrictions on a union's right to expel than to fine members. Thus Section 8(c)(6) of the House bill more severely limited the right of expulsion from a union than did 8(c)(5) of the same bill which dealt with limitations on a union's right to fine its members. The latter merely enjoined the use of fines as a penalty for members exercising certain basic civil rights of the kind now protected in the "Bill of Rights" portion of the Labor-Management Reporting and Disclosure Act of 1959. Neither of these provisions prohibited a union from disciplining a member for the infraction of a union rule of the type here involved. As the Trial Examiner has so aptly observed, to accept the General Counsel's attempted distinction is to conclude that, despite the express disavowals by the sponsors of Section 8(b)(1)(A) of any intent to interfere in the internal affairs of unions and despite the rejection of House attempts to do so, the result of the enactment of present Section 8(b)(1)(A) was to impose more stringent restrictions on union discipline than even those prohibited in the rejected House measures.

In other words, it is most unlikely that with knowledge of the long existing union practice of enforcing internal union policies by fine as well as by suspension and expulsion, and disavowing any intent to interfere in the internal affairs of unions, Congress intended to leave a union with no power to deal with offending union members except, as the General Counsel asserts, either by tolerating them or by expelling them from membership, a procedure that could well prove self-defeating.

In support of his construction of the proviso to Section 8(b)(1)(A), the General Counsel relies on a certain dictum of the court in the *Allen Bradley* case,[8] which, reversing the Board, held that it was not a violation of Section 8(a)(5) and (1) of the Act for an employer to insist as a condition precedent to entering into a collective-bargaining contract that the union agree to the employer's proposal limiting the right of the union to discipline union members for refraining from participating in strikes called by the union. The Board does not acquiesce in this decision or in the dictum upon which the dissent relies. Not only is the decision contrary to the Board holding in this as well as in other cases,[9] but it is also inconsistent with holdings of other Courts;[10] and with the same court's holding in the *American Newspaper Publishers'* case,[11] where the court

[8] *Allen Bradley Company* v. *N.L.R.B.*, 286 F. 2d 442 (C.A. 7), setting aside 127 NLRB 44.

[9] *Minneapolis Star and Tribune Company*, 109 NLRB 727, 729 ("... the imposition of a $500 fine on Carpenter by the Respondent Union for his failure to engage in certain of its activities is not violative of Section 8(b)(1)(A) of the Act. It is well established that the proviso to Section 8(b)(1)(A) precludes any such interference with the internal affairs of a labor organization.")

[10] *Local 248, UAW* v. *Wisconsin Board*, 11 Wis. (2d) 292, 105 N.W. (2d) 278 (Union fine of member for crossing a picket line during strike held arguably protected by the proviso to Section 8(b)(1)(A)); *UAW* v. *Woychik*, 5 Wis. (2d) 528, 93 N.W. (2d) 336 (Union may recover fine levied against member for failure to picket during strike.); *Retail Clerks* v. *Christiansen*, Washington Justice Court, Grays Harbor County, 54 LRRM 2558 (Union may recover fines imposed against members who continued working during strike. "It is the court's opinion that inasmuch as there has been no interference affecting the right of defendants in their employment and that the action involves only the employees and the union, and the charges are based upon specific violations and the fines imposed under the authority of the bylaws, that this is an action which is one involving the internal affairs of the union and Sections 7 and 8 of the Act are inapplicable. ... [A] union may reasonably discipline its members for infractions of its laws, rules and regulations so long as the discipline does not deprive the member of his property right.")

[11] *American Newspaper Publishers' Association* v. *N.L.R.B.*, 193 F. 2d 782, 800-801 (C.A. 7).

agreed with the Board that a union did not violate Section 8(b)(1)(A) by threatening to expel any member who worked in a composing room where all the employees were not members of the union.

It is also significant that while the Board, during the 12 years following Taft-Hartley, has interpreted Section 8(b)(1)(A) and its proviso so as not to interfere in a union's internal affairs,[12] Congress has not indicated that a broader interpretation of the Section was intended or desired. Moreover, as pointed out by the Trial Examiner, the legislation which Congress did enact in 1959 sheds further light on the problem before us and buttresses the conclusions which we reach. The Landrum-Griffin amendments contain a fairly comprehensive code governing the internal affairs of labor organizations. Jurisdiction over these matters was not, however, given to the Board. Rather it was the Federal Courts which were authorized to enforce the new law.[13] Furthermore, insofar as is relevant here, these 1959 amendments went no further than to impose certain notice and hearing requirements on the imposition of union discipline[14] and prohibited the use of such discipline to prevent employees from exercising certain fundamental freedoms.[15]

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[12] See *Minneapolis Star and Tribune Company*, 109 NLRB 727, 729. We do not agree with the General Counsel that there is an implication in the Board's decision in that case that the imposition of the fine was collectible only by threat of expulsion.

[13] See *McCraw* v. *United Association, Local Union No. 43*, U.S. District Court, Eastern District of Tennessee, 216 F. Supp. 655 (1963). See also Labor-Management Reporting and Disclosure Act of 1959, Title I, Section 102.

[14] Labor-Management Reporting and Disclosure Act of 1959, Title I, Section 101(a)(5).

[15] Labor-Management Reporting and Disclosure Act of 1959, Title I, Section 101(a)(2).

These laws show that Congress has not ventured to the outermost limits in regulating internal union affairs. Some subjects still remain unregulated under existing Federal law.[16] Thus, we cannot agree that, 12 years earlier, Congress had enacted the substantial and far reaching limitations on the powers of unions to prescribe rules governing the conduct of their members, as urged by the General Counsel.[17]

Our dissenting colleague argues forcefully that the proviso to Section 8(b)(1)(A) permits the imposition of union rules on employees as *union members,* but does not apply to the enforcement of rules against employees as *employees.* Proceeding from this premise, the dissenting opinion then finds that the subjects of production and wages are matters "clearly related to *employment* and not to *membership*. . . ." But the conclusion does not follow the distinction. Obviously, production and wages are related to jobs. Jobs are related to employees and employees may, if they so desire, be union members. A union rule that a *member* is subject to a fine if he exceeds a production ceiling does not mean that he is subject to such a fine as an *employee.* Nor does it mean that his employment status is affected so long as the Union does not attempt to exact payment of the fine by pressure on his employer or discrimination in his job opportunities.

It should not need saying that unions exist for the purpose of collective bargaining with respect to wages,

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[16] See *Aaron,* The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. Law Rev. 851.

[17] See the Supreme Court's observation in the *Curtis* case that later statutes may be taken into account in interpreting vague language of an earlier law. *N.L.R.B.* v. *Drivers, Chauffeurs, etc., Local 639 (Curtis Brothers),* 362 U.S. 274, 291-292.

hours, and conditions of employment. Necessarily, their constitutions and bylaws reflect this basic purpose. In a sense, virtually all union rules affect a member's employment relationship.

But the Board has not been empowered by Congress to police a union decision that a member is or is not in good standing or to pass judgment on the penalties a union may impose on a member so long as the penalty does not impair the member's status as an employee. Our dissenting colleague's view would require the Board to sit in judgment on union standards of conduct for its members even though such standards are not enforced by threats affecting the member's job tenure or job opportunities. Whether or not the Union's rule in this case is desirable or equitable is a matter we need not and do not decide. It is sufficient, in our view, that the Union deliberately restricted the enforcement of its rule to an area involving the status of a member as a *member* rather than as an *employee.*

We find, in argument with the Trial Examiner, that the Respondent did not violate Section 8(b)(1)(A) of the Act.

ORDER

IT IS HEREBY ORDERED that the complaint filed herein be, and it hereby is, dismissed.

Dated, Washington, D. C., Jan. 17, 1964.

FRANK W. MCCULLOCH, *Chairman*
JOHN H. FANNING, *Member*
GERALD A. BROWN, *Member*
NATIONAL LABOR RELATIONS BOARD

(SEAL)

Member Jenkins, concurring:

I concur in the result reached by the majority, but would predicate the result on a more simplified basis which concedes much of the argument advanced by my dissenting colleague. Nothing in the Act seeks to regulate the right of a labor union to place a ceiling on the earnings of its members. Therefore the subject matter of the rule, like other union rules pertaining to matters such as meeting attendance requirements, cannot be said of itself to offend the Act even if it were an unreasonable rule. The only issue presented by the Charge is whether in some manner the enforcement of the rule has restrained or coerced the Charging Parties in their exercise of Section 7 rights.

In the context of this case, it cannot be said that enforcement of the rule is coercive since the Charging Parties were free either to join the Union and be subject to the rule, or refrain from joining and not be subject to the rule. The Charging Parties would have it both ways. It is axiomatic that the rights guaranteed under Section 7 are not absolute rights and that alternative choices must often be made by those who would exercise those rights. Had the Union here sought a benefit for its members which was denied to nonmembers, the action would clearly have been coercive. Cf. *Radio Officers* v. *Labor Board (Gaynor News)*, 347 U. S. 17. Certain it is, however, that where, as here, the Union imposes restrictions upon its own members which are not imposed upon nonmember employees, the action may not logically be described as coercive. The fact that some members of the union dislike and refuse to abide by the rule no more causes it to violate the Act than did the top seniority accorded to employees of the larger of two merged employers in *Trailmobile Co.* v. *Whirls*,

331 U. S. 40, or to shop stewards in *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521.

Dated, Washington, D. C., Jan. 17, 1964.

HOWARD JENKINS, JR., *Member*
NATIONAL LABOR RELATIONS BOARD

Member Leedom, dissenting:

This case presents the question of whether a union that has unilaterally promulgated a restrictive scheme of work production quotas may, with legal impunity, enforce that scheme against employees, members of the union, through the imposition of severe retaliatory penalties, including monetary fines.

Since 1938, Respondent Union has had an established scheme of production ceilings or work quotas. The production ceilings, first formulated pursuant to a "gentleman's agreement" between union members, were later formalized by a union resolution, and finally became the subject of a union bylaw. The bylaw, *inter alia,* provides that members who fail to abide by the work quotas shall be subject to a fine, and, in the case of habitual offenders, discipline by ths Union on the charge of conduct unbecoming a union member.[18] At present the production

[18] The bylaw, in pertinent part, reads as follows:

A. The basic object of the Union is to protect members of the Union in their employment and to give them as much security as the industry can provide. The Local Union in its judgment and reasoning has established a production ceiling which it feels will bring more protection to the members. It follows that a member who is found in violation of the [sic] this rule is guilty of conduct unbecoming a union member.

B. Any member who violates these ceilings shall be subject to a fine of one dollar ($1.00) for each violation. The violators shall be processed by not less than 3, nor more than [sic] than 5 members of the Executive Board.
In case of persistent ceiling violations, the member will be charged with conduct unbecoming a Union Member.

ceilings limit an employee's earnings to 45 to 50 cents per hour over the machine rate, which is based on minimum employee production requirements.

The contract between the Employer and the Union contains a union-security provision. By its terms all employees are required to become members of the Union after the thirtieth day of employment or pay a service fee which shall not exceed the amount of the Union's monthly dues.[19]

The Employer has placed no limits on the employees' production or earnings and has vigorously opposed such a limitation, but without success. The Company is in a highly competitive market, and the increased costs resulting from the Union's production ceilings have caused a decline in its competitive position. The record shows that the Union's production ceilings have reduced and slowed down production, that an employee can reach the production ceiling in five hours, and that the employees have read books, played cards, and talked in the remaining time.[20]

In February 1961, the Union discovered that the Charging Parties had been violating the work quota rule. Subsequently, a hearing was held before the Union's trial board, and each of the Charging Parties was found guilty of "conduct unbecoming a Union member,"

[19] While, in light of the presence of the service fee provision in the contract it can not be said as a matter of law that *all* employees were required to join the Union, it is obvious that the contract provisions left so little to choice that, as a practical matter, the employees were compelled to join the Union in order to obtain the most value for the money they were required to expend.

[20] In spite of this, the employees produce more than the production ceilings allow. The excess is "banked" for payment in the future when an employee is unable, for any reason, to produce the maximum allowable under the production ceilings.

was fined $50 to $100, and was suspended from union membership. In October 1961, the Union brought suit against the Charging Parties in a state court to collect the fines.

On these facts, the General Counsel issued a complaint against the Union, charging that the fines that were imposed restrained and coerced employees in the exercise of their Section 7 rights and therefore violated Section 8(b)(1)(A) of the Act.[21] My colleagues are validating the Union's actions. I disagree. In my opinion, my colleagues' holding misconstrues a very basic section of the Act, misinterprets Congressional intent, undermines Congressional policy, and disregards established precedent.

In refusing to abide by the Union rule, the employees were exercising their Section 7[22] right to refrain from Union activity.[23] In fining the employees, the Union was attempting to force these employees to cease exercising

[21] Section (b)(1)(A) provides as follows: It shall be an unfair labor practice for a labor organization or its agents: (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

[22] Section 7 of the Act reads:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the rigth to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

[23] *Printz Leather Co., Inc.*, 94 NLRB 1312. My colleagues apparently concede that the Charging Parties were exercising their Section 7 right in refusing to limit their production pursuant to the Union's rule for, absent such right, it would have been unnecessary to reach the issues discussed in the majority opinion.

that Section 7 right. The question is whether the fine employed by the Union as a sanction to compel the Charging Parties to comply with the Union rule constitutes restraint or coercion within the meaning of Section 8(b)(1)(A), and, if so, whether the Union's action is nevertheless protected by the proviso to that Section. I think it is clear that the fines imposed do constitute such restraint and coercion, and that the proviso does not afford any protection to the Union.

The Supreme Court has left little, if any, room for argument over the meaning of the words "restrain or coerce" used in Section 8(b)(1)(A). In *N.L.R.B.* v. *Drivers, Local No. 639 (Curtis Brothers)*, 362 U. S. 274, which involved the question of whether recognitional picketing by a minority union constituted a violation of Section 8(b)(1)(A), the Court, after a thorough analysis, concluded that Section 8(b)(1)(A) was "a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof — conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes."

A careful reading of the Court's opinion shows that the word "reprisal," as used by the Court, means economic as well as physical reprisal, and specifically includes financial exactions.[24] Thus, the Court referred to some

[24] In this connection, I point out that the economic pressure inherent in a fine is not unlike the pressure caused by the threat of loss of employment which has always been recognized as economic "intimidation" or "reprisal" constituting a violation of Section 8(b)(1)(A). (See, for example, *International Association of Bridge, Structural & Ornamental Iron Workers*, 112 NLRB 1059; *Marlin Rockwell Corporation*, 114 NLRB 553, 562; *Tellepsen Construction Co.*, 122 NLRB 568; *Local 138 International Union of Operating Engineers (Nassau & Suffolk Contractors Assn.)*, 123 NLRB 1393, 1396. In my opinion there is little difference between a union's causing the discharge of an employee for refraining from engaging in concerted activity, and a union's fining

of the examples mentioned by Senator Ball in the legislative debates involving threats of "violence, job reprisals and such repressive assertions as that double initiation fees would be charged those who delayed joining the union," as the type of conduct against which Section 8(b)(1)(A) was directed; and the Court summed up the "central theme" of the legislative debates on the Section as seeking "the elimination of the use of repressive tactics bordering on violence or involving particularized threats of economic reprisal."[25]

In the later *International Ladies' Garment Workers' Union* v. *N.L.R.B., (Bernhard-Altmann)* case, 366 U. S. 731, the Court set forth the proposition that Section 8(b)(1)(A) prohibited "unions from invading the rights of employees under Section 7 in a fashion comparable to the activities of employers prohibited under Section 8(a)(1)," pointing out that it was the "intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employee rights."[26]

The Board itself in the past has read "restrain or coerce" in Section 8(b)(1)(A) in a manner consistent with the ordinary meaning of the term. Thus the Board has held that compulsion by sanctions, such as fines and

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the partial, or total, equivalent of his salary for refraining from engaging in concerted activity. Each is an equally potent form of economic restraint and coercion, and the net effect of each on the employees involved could be identical.

[25] *Curtis Brothers, supra,* at p. 286-87. The Court cited the remarks of Senator Taft in which he stated that Section 8(b)(1)(A) was intended to outlaw threats of "economic reprisal," and also cited with approval the language of the Board's decision in *Perry Norvell Co.,* 80 NLRB 225, listing economic reprisal as one of the means proscribed by Section 8(b)(1)(A).

[26] *Bernhard-Altmann, supra,* at p. 738.

expulsion from membership, "are in fact coercive,"[27] and has also found that other forms of pressure directed against employees, including threats not to process grievances,[28] threats of union disciplinary action and expulsion,[29] and causing a reduction in seniority,[30] likewise constitute restraint and coercion within the meaning of Section 8(b)(1)(A).

Accordingly, consistent with the foregoing authoritative case law, I am of the opinion that the fines levied by the Union against the Charging Parties in the instant case constitute restraint and coercion under Section 8(b)(1)(A) of the Act.[31]

The proviso to Section 8(b)(1)(A) does not compel a contrary conclusion. That proviso excepts from the

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[27] *Peerless Tool and Engineering Co.*, 111 NLRB 853, 857; see also *Minneapolis Star and Tribune Co.*, 109 NLRB 727, in which the Board adopted the Trial Examiner's conclusion that a fine was a "form of coercion."

[28] *Ibid.*

[29] *Local 401; International Brotherhood of Boilermakers (M.A. Roberts & Co.,)*, 126 NLRB 832, 834; *United States & Allied Products Workers (Gibsonburg Lime Products Co.)*, 121 NLRB 914.

[30] *Miranda Fuel Company, Inc.*, 140 NLRB 181.

[31] The legislative history of Section 8(b)(1)(A) fully supports this interpretation that the language, "restrain or coerce," covers the conduct herein. Section 8(b)(1)(A) originated in the Senate as an amendment to S. 1126. It was sponsored by a group of Senators who could "see no reason whatsoever why [unions] should not be subject to the same rules as the employers" and accordingly introduced Section 8(b)(1)(A) as a corresponding section to 8(a)(1). (Senate Report No. 105 on S. 1126, Supplementary views, Leg. Hist. of the LMRA, 1947, Vol. I, p. 456) Senator Ball, who introduced the amendment, explained that its purpose was "to insert an unfair labor practice for unions identical with [Section 8(a)(1)] . . ." which was essential "to equalize the rights and responsibilities of both employers and unions in this field, to really assure to employees the fredom supposedly guaranteed in Section 7, . . ." (Leg. His. of the LMRA, (1947), Vol. II, p. 1018, 1021.) During the debates, Senators repeatedly stressed that Section 8(b)(1)(A) was to be read and interpreted as broadly as its Wagner Act counterpart. When Senator Pepper asked what the interpretation of the language "restrain or coerce" would be, Senator Taft answered that "the Board has been defining those words for 12 years . . ." and although the "application to labor organizations may have a slightly

ambit of 8(b)(1)(A) only such restraint or coercion that results from a union's application of its rules relating to "the acquisition or retention of membership."[32]

different implication . . . from the point of view of the employee the two [sections] are parallel." (Leg. Hist. of the LMRA, 1947, Vol. II, p. 1028, and to the same effect p. 1032-33.)

Contrary to my colleagues, it does not appear that Congress intended to limit Section 8(b)(1)(A) to any particular type of rstraint or coercion. In the course of the debates, examples of the conduct that would be prohibited by Sestion 8(b)(1)(A) included threats of higher initiation fees or higher dues, "retaliatory" internal union disciplinary action, threats to strike, threats to picket, threas of loss of employment, economic pressure, and misrepresentation. (Leg. Hist. of the LMRA (1947) Col. II, pp. 1018-1019; 1200; 1205; p. 1029; p. 1030; p. 1031; p. 1192-93.) No attempt was made by Congress either to exhaust or to construct the scope of the statutory language. Further, I do not agree with my colleagues that the House understood that Section 8(b)(1)(A) covered only that conduct which had been dealt with under Section 12(a)(1) of the House Bill (H.R. 3020). Rather, the House Conference Report shows that Section 8(b)(1)(A) *included*, but was not limited to, the conduct outlawed by Section 12(a)(1) of the House Bill. Leg. Hist. of LMRA, 1947, Vol. II, p. 546.

[32] The legislative history of the proviso clearly shows that the restrictive terms in which the proviso was written were not chosen by accident, but by design, and that Congress meant just what it said, no more. The proviso originated in the Senate and was offered by Senator Holland as an amendment to Section 8(b)(1)(A). In introducing the amendment; Senator Holland stated that the proponents of Section 8(b)(1)(A) had not intended that section "to affect at least that part of the internal administration which has to do with the admission or the expulsion of members, that is with the question of membership," and that his amendment (the proviso) "would make clear that [Section 8(b)(1)(A)] would have no application to or effect upon the right of a labor organization to prescribe its own rules of membership either with respect to beginning or terminating membership." (Leg. Hist. of LMRA, 1947, Vol. II, pp. 1139, 1141.) Senator Ball, who accepted the proviso as an amendment to Section 8(b)(1)(A), replied that "it was never the intention of the sponsors of [Section 8(b)(1)(A)] to interfere with the internal affairs or organization of unions," and he subsequently described the proviso more specifically as covering "the requirements and standards of membership in the union itself." (Leg. Hist. of the LMRA, 1947, Vol. II, p. 1141; p. 1200.) In the face of these authoritative statements from the two men in the Senate most intimately acquainted wih he proviso, I cannot, as my colleagues do, subscribe to an interpretation based on the more general characterizations of certain legislators.

As the Board stated in *Marlin Rockwell Corp.*, 114 NLRB 553, 562:

> As we read the 8(b)(1)(A) proviso, its sole purpose is to guarantee to unions the privilege, as a voluntary association, *to determine both who shall be a union "member" and what substantive conditions a "member" must comply with in order to acquire or retain union membership status.* It is for this reason that the Board cannot and will not judge the fairness or unfairness of internal union determinations which may enable or disable particular individuals to obtain the incidental benefits of union membership as provided by internal union legislation. (Emphasis supplied.)[33]

And more recently, in *Allen Bradley Co.* v. *N.L.R.B.*, 286 F. 2d 442, the Seventh Circuit shared this view of the scope of the proviso saying:

> . . . [The] Board strenuously insists that the Company proposal was not a subject for bargaining because the Union in its coercive activities was protected under the proviso in Section 8(b)(1)(A), which authorizes the Union to prescribe its own rules "with respect to the acquisition or retention of membership therein." True, the fines which the Union had previously imposed and about which the Company was concerned were authorized by Union rule. Even so, *there is nothing in the situation before us which indicates that such fines bore any relation to the "acquisition or retention of membership." The Board evidently recognizes this because it argues, "imposition of the fine is merely a step in determining membership status; non-payment leads to expulsion."* We assume that a union has broad powers in prescribing rules relative to the acquisition and retention of its members. However, that power, in our view, is not absolute. *It goes beyond*

[33] See also *The Babcock & Wilcox Co.*, 110 NLRB 2116, 2132-3.

any permissible limit when it imposes a sanction upon a member because of his exercise of a right guaranteed by the Act. Coercive action whether by way of fine, discharge or otherwise, which deprives a member of his right to work and his employer of the benefit of his services, cannot be said to relate only to the internal affairs of the union. (Emphasis supplied.)[34]

I find the rationale of these cases most persuasive for it comports with the language of the proviso itself as well as its legislative history. This rationale, moreover, achieves the accomodation intended by Congress between the rights Congress guaranteed employees and the right of unions to determine their own qualifications for membership. In my opinion, therefore, it cannot reasonably be said that the Union's conduct here related to its right "to prescribe its own rules with respect to the acquisition or retention of membership . . . ." Accordingly, I conclude that Respondent's conduct is not protected by the proviso.

According to my colleagues, the proviso to Section 8(b)(1)(A) protects all internal union affairs or all action taken pursuant to the union's rules and internal processes. They attempt to prove that the proviso does not mean what it says by arguing that Congress did not intend to distinguish between expulsion and any other form

[34] My colleagues atempt to distinguish the *Allen-Bradley* case on the ground that the Court "was not called upon to find" whether the union had a right under Section 8(b)(1)(A) to fine a member for crossing a picket line and that, accordingly, the above portion of the opinion was *obiter dictum*. However, as the portion of the Court's opinion quoted above clearly shows, and as a reading of the Board's decision and brief in that case will confirm, the Board argued in that case that the union's conduct which the employer wished to subject to bargaining was protected by the proviso to Section 8(b)(1)(A). Therefore, it cannot rightly be said, as my colleagues do, that the Court's discussion of this issue "was not essential to a decision in the case."

of union discipline, such as a fine, in the application of the proviso. However, in view of the special treatment Congress gave expulsion, as opposed to any other form of coercion by union discipline, I think that Congress did intend such a distinction. Employees are specifically protected against coercion in the form of expulsion by the second proviso to Section 8(a)(3), which guarantees employees that expulsion for any reason other than nonpayment of dues and fees will not imperil their job security.[35] Thus, Congress preserved the right of unions to deny membership to, or terminate the membership of, whomever they pleased regardless of the reason; but, at the same time, Congress insulated employees from coercion by making sure that they would suffer no economic consequences as a result of such action.[36]

But even assuming that the proviso has a broader reach than I would ascribe to it, I would still disagree that the matter here involved is one that is merely a matter of internal union regulation. Employees may occupy a dual status: first, is their status as *employees;* second, is their

[35] My colleagues argue that no action has been taken here to impair the employees' job status or job opportunites. Apparently, they are unwilling to recognize that impairment of job status or job opportunities can take the form of restricting an employee in his earnings where, as here, that employee is willing to work and the employer wants the benefit of his services. That the fines were intended to have this restrictive effect cannot be denied.

[36] See the debate between Senator Taft and Senator Pepper, Leg. Hist. of LMRA, 1947, Vol. II, p. 1141-1142 and also p. 1096-97. As shown by the above rationale, there is nothing inconsistent in the decision of the Court of Appeals for the Seventh Circuit in *Allen Bradley* and the decision of the same court in *American Newspaper Publishers' Association* v. *N.L.R.B.*, 193 F. 2d 782. The latter case involved a union's threat to expel members, conduct which specificially falls within the proviso. Speaking of the proviso, the court said:

> . . . Congress left labor organizations free to adopt any rules they desired governing membership in their organizations. Members could be expelled for any reason and in any manner prescribed by the organization's rules, so far as 8(b)(1)(A) is concerned.

status as *union members*. Those matters affecting employees as *union members* may appropriately be referred to as internal union affairs. Those matters which affect employees as *employees* are not internal union affairs. Of course, it is quite possible that some matters may affect both the employment relationship and the membership relationship, but to the extent they involve the former, they are not internal union affairs. Here, I am satisfied that the Union's attempt to control production and wages, which are subjects clearly related to *employment*, and not to *membership*, is not merely an internal matter.

Under my colleagues' reading of the proviso, it would appear that the Union can turn any employment matter or Section 7 right into an internal union affair simply by adopting a union rule or bylaw dealing with the subject and disciplining employees thereunder.[37] But there is no evidence that Congress ever intended to permit the subversion of employees' rights by unions under the guise of

[37] For example, prusuant to a union rule or bylaw, unions, under my colleagues' decision, could now fine employees for filing charges with the Board against the union, for testifying against the union in Board proceedings, for filing a decertification petition, for refusing to give the union a copy of any statement made to a Board agent, for giving a statement to a Board agent without the union's approval, for refusing to participate in unlawful union activity, for working with nonunion employees, for working with Negro employees, for filing a grievance not approved by the union, for producing more than a certain number of items per day, and for working more than 30 hours per week.

regulating the conduct of union members.[38] In short, I think that when unions use the union membership of employees — membership which may, or may not, be voluntary — as a means of encroaching on their rights as employees, which Congress did regulate, the unions subject themselves to the sanctions of Section 8(b)(1)(A) of the Act. More particularly, by imposing fines on these employees because they exceeded the Respondent Union's unilaterally established work production quotas the Respondent Union took action which went beyond any permissible limit, that is, the action taken did not relate only to the internal affairs of the Respondent Union but imposed a sanction on its members because they exercised their right, guaranteed by the Act, not to go along with the Union imposed production quotas.

Accordingly, for all the foregoing reasons, I would find that the Respondent violated Section 8(b)(1)(A) of the Act, as alleged.

Dated, Washington, D. C., Jan. 17, 1964.

BOYD LEEDOM, *Member*
NATIONAL LABOR RELATIONS BOARD

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[38]. See *Local 100, United Association of Journeymen and Apprentices* v. *Borden* 373 U. S. 690, in which the Supreme Court recognized that even though the union's action was based on the employee's failure to comply with internal union rules "it is certainly 'arguable' that the union's conduct violated Section 8(b)(1)(A), by restraining or coercing Borden in the exercise of his protected right to refrain from observing those rules . . ." The Court went on to distinguish its earlier decision in *I.A.M. v. Gonzales,* 356 U. S. 617, on the ground that *Gonzales* involved matters relating to expulsion which was an internal union affair, not within the Board's competence by virtue of the proviso to Section 8(b)(1)(A). See also *Local 207, International Association of Bridge, Structural and Ornamental Iron Workers Union* v. *Perko* 373 U. S. 701.